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2011 OCT 31 P 4: 30  
OF COUNSEL TO  
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ARIZONA CORPORATION COMMISSION  
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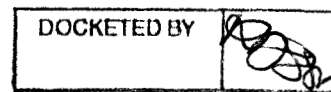
October 27, 2011

Arizona Corporation Commission

DOCKETED

OCT 31 2011

Docket Control  
Arizona Corporation Commission  
1200 West Washington  
Phoenix, Arizona 85007



Re: Michael W. Schultz & Pamela J. Schultz dba  
Rincon Creek Water Company  
Docket No. W-03783A-10-0172

To Whom It May Concern:

Enclosed for filing in the above-referenced proceeding are the original and thirteen (13) copies of the Opening Brief ("Opening Brief") of Transferees/Co-Applicant William Shirley and Gretchen Shirley.

Also enclosed are two (2) additional copies of the Opening Brief. I would appreciate it if you would "filed" stamp the same and return them to me in the enclosed stamped and addressed envelope.

Thank you for your assistance. Please advise me if you have any questions.

Sincerely,

Angela R. Trujillo

Assistant to

Lawrence V. Robertson, Jr.

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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION  
DOCKET CONTROL

**COMMISSIONERS**

**GARY PIERCE, Chairman**  
**BOB STUMP**  
**SANDRA D. KENNEDY**  
**PAUL NEWMAN**  
**BRENDA BURNS**

IN THE MATTER OF THE APPLICATION OF )  
MICHAEL W. SCHULTZ AND PAMELA J. ) DOCKET NO. W-03783A-10-0172  
SCHULTZ DBA RINCON CREEK WATER )  
COMPANY, FOR APPROVAL OF SALE OF ) **TRANSFEREES/CO-APPLICANT**  
ASSETS AND TRANSFER CERTIFICATE OF ) **SHIRLEY'S OPENING BRIEF**  
CONVENIENCE AND NECESSITY. )

**I.**

**INTRODUCTION**

Pursuant to the Commission's August 11, 2011 Procedural Order, Transferees/Co-Applicant William Shirley and Gretchen Shirley (collectively "Shirley") submit this Opening Brief in the above-captioned and above-docketed proceeding. In Section II below, Shirley discusses each of the three (3) issues identified at page 2, lines 14.5-23.5 of the aforesaid Procedural Order.

**II.**

**DISCUSSION**

**Issue No. 1: Is Rincon Creek Water Company Legally Obligated to Bill and Collect Those Rates for Water Service Which Have Previously Been Authorized by the Commission?**

Neither Title 40 of the Arizona Revised Statutes nor the Commission's regulations applicable to the provision of water service appear to address this question. In addition, based upon the research conducted by Shirley, it appears that to date neither a court nor the Commission has addressed this issue in any written decision. Thus, the instant proceeding represents a case of first impression in that regard.

1        Given the absence of any legislative guidance or regulatory or judicial precedent, Shirley  
2 believes that this issue is best resolved through an analysis of those public interest considerations  
3 which arise from the possession of a certificate of convenience and necessity ("CC&N"), and the  
4 exclusive right of service which it confers. These considerations are embodied within the phrase  
5 "public service obligation"; and, simply stated, they pertain to the right of customers of the  
6 public service corporation in question to receive safe, adequate and reliable service on an  
7 ongoing basis at reasonable rates.

8        Absent a showing that the failure to charge and collect the authorized rates<sup>1</sup> for water  
9 service has resulted in the public service corporation in question not being able to provide safe,  
10 adequate and reliable service on an ongoing basis, it would appear that there has not been any  
11 violation of the aforesaid public service obligation. The possessor of the CC&N is legally  
12 entitled to recover its prudently incurred operating expenses; and, it is also legally entitled to the  
13 opportunity to endeavor to realize a fair and reasonable rate of return on its investment devoted  
14 to serving the public. However, the research conducted by Shirley has found no statute or  
15 regulation which requires that those legal rights be exercised. Nor, has a regulatory or judicial  
16 decision of that nature been identified. Thus, assuming that the possessor of the CC&N is  
17 willing and prepared to voluntarily provide the financial resources necessary to enable it to fully  
18 discharge its public service obligation on an ongoing basis, it is difficult to conclude as a matter  
19 of public policy why such entity or person should be required to exercise its aforesaid legal  
20 rights. Or, why a sanction should be imposed when such entity or person have elected not to do  
21 so.

22        In that regard, the scenario hypothecated above appears to be precisely the history  
23 surrounding both Mr. Acosta's and Mr. Schultz' ownership and operation of Rincon Creek  
24 Water Company during the past 50+ years.<sup>2</sup> Moreover, this manner of ownership and operation  
25 (at no cost to the customers) had been the intent of Shirley as well, in the event that the proposed  
26 sale of water system assets and transfer of the CC&N to them is authorized.<sup>3</sup> Further, the

27  
28 <sup>1</sup> This analysis assumes that no other rate has been charged or collected.

<sup>2</sup> Tr. 10, l. 14-16 (Schultz); Tr. 12, l. 6-20 (Schultz).

<sup>3</sup> Tr. 23, l. 10-12 (Shirley); Tr. 94, L. 20-22 (Shirley).

1 evidence in the instant proceeding also indicates that Shirley intends to provide water service in  
2 the future to only (i) the existing four (4) customer connections, (ii) the existing headquarters  
3 complex of their guest ranch and (iii) the eight (8) new guest ranch casitas they intend to  
4 construct.<sup>4</sup> Finally, Shirley appears to possess the financial resources necessary to fully  
5 discharge on an ongoing basis that public service obligation arising from ownership and  
6 operation of Rincon Creek Water Company, without the necessity of charging and collecting any  
7 rates for water service.<sup>5</sup>

8 In summary, Shirley believes that the owner and operator of Rincon Creek Water  
9 Company is not legally obligated to bill and collect those rates for water service which have been  
10 previously (or hereafter may be) authorized by the Commission; provided, (i) the owner and  
11 operator of the company at all times remains financially capable of fully discharging its public  
12 service obligation on an ongoing basis, and (ii) the owner and operator is not charging a different  
13 rate than that which has been authorized or engaging in any form of rate discrimination.

14 **Issue No. 2: Assuming (for Discussion Purposes) That the Current and Previous**  
15 **Owner(s) of Rincon Creek Water Company Should Have Been Charging and**  
16 **Collecting Rates Authorized by the Commission for Water Services, What**  
17 **Action, If Any, Should Be Taken by the Commission Against Such**  
18 **Individual(s)?**

19 Succinctly stated, Shirley believes that the answer to this question is *NONE*.

20 More specifically, the Commission has the power to impose a variety of sanctions for  
21 violations of its regulations and decisions.<sup>6</sup> However, Shirley believes that the Commission's  
22 authority in that regard presupposes the existence of a knowing violation or violations upon the  
23 part of the person(s) against whom the sanction will be levied. That is not the situation in this  
24 case. To the contrary, the evidentiary record indicates that neither Mr. Acosta or Mr. Schultz  
25 (nor Mr. Shirley) had any awareness that he was required to charge and collect those rates for  
26

27 <sup>4</sup> Tr. 23, l. 13 – Tr. 24, l. 23 (Shirley); Tr. 52, l. 11-19 (Shirley).

28 <sup>5</sup> Tr. 24, l. 5-14 (Shirley); Tr. 41, l. 14 – Tr. 42, l. 8 (Shirley); Tr. 91, l. 16 – Tr. 93, l. 3 (Shirley).

<sup>6</sup> A.R.S. § 40-424 through A.R.S. § 40-426, and A.R.S. § 40-428 through A.R.S. § 40-429.

1 water service which had been authorized by the Commission in Decision No. 31637.<sup>7</sup> Further,  
2 that same record indicates that Mr. Acosta and Mr. Schultz did not charge any rates which had  
3 not been authorized by the Commission. Rather, be it for reasons of "good will" or "good  
4 neighborliness," they charged no rates for water service; and, they appear to have done so with  
5 the understanding that such a course of action was lawfully within their discretion. Accordingly,  
6 that "mens rea" which would warrant the imposition of a sanction by the Commission is simply  
7 not present in this instance.

8 Similarly, the imposition of a sanction pursuant to the above-referenced statutory  
9 authority also appears to assume that the violation in question has detrimentally impacted the  
10 customers of the affected public service corporation. Again, the evidentiary record in the instant  
11 proceeding does not support such an assumption. To the contrary, and rightly or wrongly, it  
12 appears that the four (4) customers of the company would be offended if they were to be billed  
13 for the water service they receive!<sup>8</sup> Further, there is no indication in the hearing record of any  
14 complaints by those customers as to the quality, adequacy or reliability of the service they have  
15 received. Hence, once again, a rational predicate to support the imposition of a sanction against  
16 either Mr. Acosta<sup>9</sup> or Mr. Schultz does not appear to exist.

17 With reference to the future, the situation is quite different. Whether or not the  
18 Commission approves or denies the proposed transfer of Rincon Creek Water Company's water  
19 system assets and CC&N to Shirley, in its decision it will be in a position to put the resulting  
20 owner and operator of the company on written notice as to whether or not it must charge and  
21 collect the approved rates for water service to all customers of the company. From that point in  
22 time forward, any failure by the owner and operator of Rincon Creek Water Company would  
23 warrant the imposition of a sanction by the Commission, assuming (as has been assumed for  
24 purposes of discussion of this issue) the existence of a legal obligation to charge and collect  
25 Commission-authorized rates.

26 <sup>7</sup> Tr. 11, l. 24 – Tr. 12, l. 3 (Schultz); Tr. 19, l. 11-24 (Shirley); Tr. 20, l. 6-19 (Shirley on Acosta); Tr. 21, l. 11-15  
27 (Shirley on Acosta); Tr. 22, l. 21 – Tr. 23, l. 9 (Shirley on Acosta).

<sup>8</sup> Tr. 21, l. 11-15 (Shirley); Tr. 22, l. 21 – Tr. 23, l. 9 (Shirley); Tr. 38, l. 1 – Tr. 39, l. 3 (Shirley).

28 <sup>9</sup> Moreover, Mr. Acosta is deceased and his estate presumably has been closed. So, the ability of the Commission to  
legally impose a sanction for his action(s) is subject to serious question, not to mention impractical considerations.

**Issue No. 3: Should Rincon Creek Water Company be Adjudicated to Not Be a Public Service Corporation, Based Upon the Record in The Instant Proceeding?**

From both a practical and a legal perspective, Shirley believes that this question should be answered in the affirmative.

From a practical perspective, Rincon Creek Water Company is simply too small to warrant regulation as a public service corporation, with all of the expense and administrative time which that legal status entails. This is particularly so (i) where the prospective new owner and operator has testified that it does not intend to add any new customer connections beyond the previous four (4);<sup>10</sup> and, (ii) where the Commission, as a part of any decision adjudicating Rincon Creek Water Company not to be a public service corporation, could condition the effectiveness of its decision upon Shirley and the previous four (4) customers either (a) executing and recording the form of Well Sharing and Easement Agreement attached hereto as Appendix "A" or (b) agreeing to remain on an unrelated well, as attested to by the two (2) former customers whose letters are attached hereto as Appendix "B."<sup>11</sup>

From a legal perspective, it would appear that Rincon Creek Water Company does not satisfy the "minimum filing requirements" prescribed by the Commission in Decision No. 55568, in which the Commission established a formal process for processing applications for adjudication not a public service corporation. For example, the company is not a homeowner's association, and it does not have any members. Moreover, the application which resulted in the instant proceeding was not signed by 51% or more of the existing four (4) customers, and the prayer therein set forth was not in the nature of an adjudication request.

However, the aforesaid "minimum filing requirements" are not required by either the Arizona Constitution or Title 40 of the Arizona Revised Statutes. Rather, they were developed and articulated by the Commission through an exercise of its broad regulatory authority and

<sup>10</sup> Tr. 30, l. 2 – Tr. 31, l. 2 (Shirley). In that regard, the anticipated eight (8) new casitas will be located upon Shirley's existing guest ranch acreage, and will be a part of the guest ranch's daily operations. Thus, the guest ranch and all its improvements, including the eight (8) casitas, would be a single water customer. [Tr. 24, l. 11-13 Shirley)].

<sup>11</sup> Subsequent to the December 10, 2010 evidentiary hearing in this proceeding, two (2) of the previous four (4) customers of the company (Emde and Brinkerhoff) disconnected from the company's system, and now obtain their water from an unrelated well.

1 discretion. Accordingly, Shirley believes that one (1) or more of these same requirements can be  
2 waived by the Commission under appropriate circumstances, such as those present in the instant  
3 proceeding; and, they also believe that the Commission should exercise its discretion to that  
4 effect in this instance.

5 As previously noted, in connection with an exercise of its discretion to the end result  
6 suggested in the preceding paragraph, the Commission could condition the effectiveness of its  
7 adjudication not a public service corporation decision upon Shirley and the previous four (4)  
8 customers either (a) executing and recording the form of Well Sharing and Easement Agreement  
9 attached hereto as Appendix "A," or (b) agreeing to remain on an unrelated well, as attested to  
10 by the two (2) former customers whose letters are attached hereto as Appendix "B."

11 Thus, given the foregoing observations and considerations, Shirley believes that the  
12 Commission should include in its decision in the instant proceeding language adjudicating that  
13 Rincon Creek Water Company is not a public service corporation, subject to Shirley and the  
14 previous four (4) customers either (a) executing and recording the form of Well Sharing and  
15 Easement Agreement attached hereto as Appendix "A," or (b) agreeing to remain on an unrelated  
16 well, as attested to by the two (2) former customers whose letters are attached hereto as  
17 Appendix "B."

### 18 III.

### 19 CONCLUSION

20 Based upon the discussion set forth in Section II above, Shirley believes that the  
21 Commission should issue a decision in the instant proceeding providing for the following:

22 A) Concluding that the owner and operator of a public service corporation is  
23 not legally obligated to charge and collect Commission-approved rates for service;  
24 provided, (i) such owner and operator does not charge and collect unauthorized rates for  
25 service, and (ii) such owner and operator willingly provides at all times the financial  
26 resources necessary to enable it to provide safe, adequate and reliable service to its  
27 customers on an ongoing basis.

LAWRENCE V. ROBERTSON, JR.  
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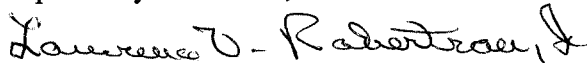
1 B) As and alternative to paragraph (A), and assuming that Commission-  
2 approved rates must be charged and collected by the owner and operator of a public  
3 service corporation, concluding upon the basis of the evidentiary record in the instant  
4 proceeding that Mr. Acosta and Mr. Shultz should not be sanctioned for their respective  
5 failure to do so in the past.

6 C) Concluding that approval of the proposed transfer of Rincon Creek Water  
7 Company's water assets and CC&N to Shirley would be appropriate and in the public  
8 interest.

9 D) As an alternative to paragraph (C), (i) concluding that, from the effective  
10 date of the Commission's decision forward, Rincon Creek Water Company (and its  
11 owner and operator) shall be deemed to not be a public service corporation, subject to  
12 Shirley and the previous four (4) customers either (a) executing and recording the form of  
13 Well Sharing and Easement Agreement attached hereto as Appendix "A," or (b) agreeing  
14 to remain on an unrelated well, as attested to by the two (2) former customers whose  
15 letters are attached hereto as Appendix "B"; and, (ii) in that regard, extinguishing Rincon  
16 Creek Water Company's CC&N.

17  
18 Dated this 27<sup>th</sup> day of October 2011.

19  
20 Respectfully submitted,

21 

22 Lawrence V. Robertson, Jr., Of Counsel  
23 Munger Chadwick, PLC  
24 Attorney for William Shirley and Gretchen  
25 Shirley, Transferees/Co-Applicants

26 The original and thirteen (13) copies of the  
27 foregoing will be mailed this 27<sup>th</sup> day of October 2011 to:

28 Docket Control Division  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, Arizona 85007



LAWRENCE V. ROBERTSON, JR.  
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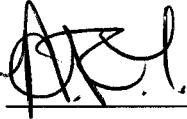
1 A copy of the same will be served by e-mail  
2 or first class mail on October 31, 2011 to:

3 Steven M. Olea, Director  
4 Utilities Division  
5 Arizona Corporation Commission  
6 1200 West Washington  
7 Phoenix, AZ 85007

8 Janice Alward, Chief Counsel  
9 Scott Hesla Legal Division  
10 Arizona Corporation Commission  
11 1200 West Washington Street  
12 Phoenix, AZ 85007

13 Michael W. Schultz  
14 Rincon Creek Water Company  
15 1102 North Anita Avenue  
16 Tucson, AZ 85705

17 William Shirley  
18 Rincon Creek Ranch  
19 8987 E. Tanque Verde Road, #309-213  
20 Tucson, AZ 85749

21   
22 \_\_\_\_\_

# **Appendix “A”**

**Transferees/Co-Applicant  
William Shirley and Gretchen Shirley  
Opening Brief  
October 27, 2011  
Docket No. E-03783A-10-0172**

When recorded, return to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

### **WELL SHARING AGREEMENT**

This Well Sharing Agreement (the "Agreement") is entered into this \_\_\_\_ day of \_\_\_\_\_, 2011 ("Effective Date"), by and between William Shirley and Gretchen Shirley (collectively, "Well Site Landowner") and David Surzyn, and Donald Crater (collectively "Recipients"). These individuals and/or entities are referred to herein, individually and collectively, as "Party" or "Parties."

### **RECITALS**

A. The Parties each own parcels of real property in Pima County which are either adjacent to or in close proximity to one another. The Well Site Landowner owns the parcel described in Exhibit 1 attached hereto ("Well Site Landowner's Property") and Recipients own the parcels described in Exhibits 2 through 3 attached hereto ("Recipients Property").

B. The Well Land Owners are developing a Type 1 Minor Resort on their property in accordance with Pima County Zoning Code 18.13.030B6 and as designated by Pima County Development Plan P1210-017 approved by Pima County on February 28, 2011. The Well Land Owners also have their personal residence and stable on the property and have an Irrigation Grandfathered Groundwater Right Certificate 58-106521.0001 covering specified acreage of their property. The Recipients have single family residences only with no intent of subdividing, constructing additional residences, or irrigating.

C. The Well Land Owners have had the well and water system reviewed by a Professional Civil Engineer, registered in the State of Arizona, and have been advised that the Well Land Owner's well capacity is sufficient to provide for the Well Land Owner's Development, the Well Land Owner's Irrigation Grandfathered Groundwater Right, and the Recipients allotted Groundwater share.

D. The Recipients desire to receive water from the Well Site Landowner's groundwater well located on the Well Site Landowner's Property. That well is registered with the Arizona Department of Water Resources ("ADWR") as Well No. 55-620931 ("Well").

E. This Agreement clarifies the Parties' relative rights to ownership and use of the Well.

F. As part of this Agreement, and in furtherance of their collective interests in their respective properties, the Parties desire to (a) establish and clarify their respective rights to the use of water from the Well and (b) establish and clarify the Recipient's rights to access and use the Well and all related facilities for the purposes of carrying out the terms of this Agreement.

## AGREEMENT

NOW, THEREFORE, in consideration of the foregoing and the mutual promises stated herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

1. Agreement to provide Groundwater from Well.

a. Subject to the terms and conditions contained herein, the Well Site Landowner does hereby grant to Landowners a non-exclusive, limited, right to withdraw and use water from the Well.

b. Each Recipient agrees that it shall not at any time withdraw or use any amount of water from the Well greater than that which is allowed pursuant to this Agreement.

c. Each Party further agrees that, if the capacity of the Well is for any reason not sufficient to produce the combined amount of water allowed to be withdrawn pursuant to this Agreement, each Party shall bear a pro-rata share of the burden of such insufficiency, such that each Party's withdrawal right shall be reduced on an equal percentage basis.

2. Grant of Easements for Access to Well and Well Site.

a. Upon receipt of request, the Well Site Landowner, within twenty-four hours, shall grant Recipients, access across the Well Site Landowner's Property to the Well and the associated well site for purposes of carrying out the terms of this Agreement. Such access shall be limited to access along, over, and across all roadways, access paths, water mains, lines, ditches, gates, pump sites, well sites, and all other water delivery and pumping facilities, whether now existing or in use on the Well Site Landowner's Property or which are hereafter constructed for use on the Well Site Landowner's Property (i) for the purpose of transporting water across the Well Site Landowner's Property by mains, lines, or ditches, and (ii) for the construction, repair, and maintenance at any time of such mains, lines, ditches, and other facilities or equipment as and when deemed necessary by the Parties for the transportation of water.

b. In the event of an emergency, such as a water delivery outage, or observation of ruptured or leaking supply line, Recipient is granted immediate access for investigating the Recipient's supply system, or closing supply line valves to prevent water loss, and shall notify Well Site Landowner immediately of the emergency.

c. Landowners hereby agree to exercise reasonable use of the right of access granted herein in order to not unreasonably interfere with, obstruct or delay the use of the Well Site Landowner's Property by the Well Site Landowner.

d. At any time, the Well Site Landowner may, at its discretion, cause a survey to be performed at its own expense by a licensed surveyor to specifically designate an exact location for an access easement upon the Well Site Landowner's Property. Such designation shall provide reasonable access to Recipients. Recipients agree that they will, upon the Well Site Landowner's request, each execute such formal written grant of easement specifically describing the location of such easement as designated by the survey and thereafter,

the access easement will be limited to the exact location as stated in the written grant of easement.

3. Installation and Operation of Meters.

a. The Well Site Land Owner, at his own expense, shall initially provide appropriate meters and valving to measure the water flowing from the Well to each Recipient. Recipients shall, at their own expense, install the meters in appropriate valve boxes. The meters shall be installed on the Well Site Landowners property, on the Recipient's supply line immediately before the supply line crosses onto the Recipient's property. Meters shall remain the property of the Well Site Landowner. Meters shall be of the type and quality necessary to satisfy the accuracy requirements established by the ADWR as provided in Section 45-604 of the Arizona Revised Statutes and any regulations promulgated thereunder, as those statutes and regulations may be from time to time amended, regardless of whether Section 45-604 otherwise applies to the Well.

b. If installation of the meter can not reasonably be located on the Well Land Owner's property, the Parties may agree to install the meter on the Recipient's property. If so installed, the meter shall become the property of the Recipient, and the Recipient shall be solely responsible for the repair and maintenance of the meter associated with the delivery of water to its property in a condition adequate to satisfy the requirements established by ADWR, as specified in Section 3(a) hereof. Recipient agrees to allow access for purposes of inspecting the meter and reviewing the general condition of all water delivery components and facilities along, over, and across all roadways, access paths, lines, ditches, gates, whether now existing or in use on the Recipients property.

c. Following initial installation of such meters on the Well Land Owner's property, the Well Land Owner shall be responsible for the repair and maintenance of the meter associated with the delivery of water to Recipient's property. The Well Land Owner agrees to maintain said meter in a condition adequate to satisfy the requirements established by ADWR, as specified in Section 3(a) hereof. No Recipient shall be required to incur any responsibility or expense for the repair or maintenance of any other Recipient or Well Land Owner's meter.

d. Either Party may, at its sole and separate expense, inspect the meter of the other Party. This right of inspection shall include the right to inspect by the Party itself and the right to have the device inspected by a professional qualified in the inspection of such devices; provided, that the Party whose meter is to be inspected shall be given advance notice of such inspection and the right to be in attendance at such time.

4. Reading of Meters.

a. On the first day of each month, each Party or its designated representative shall read the meter associated with the water delivery to its property and shall report that reading, in writing, to the Well Site Landowner within five (5) days thereafter.

b. The Well Site Land owner shall retain the right to read the meters associated with all Recipient's deliveries.

c. The relative amount of water used by each Recipient shall be calculated by subtracting the meter reading at the beginning of the month from the meter reading at the beginning of the preceding month. The relative amount of water used by each Recipient during that month shall constitute that Recipient's relative water usage for that month ("Relative Water Share").

d. In event of any dispute regarding the meter reading for any Recipient, the Parties shall confer and attempt to resolve the dispute. If the Parties cannot resolve the dispute, the Well Site Landowner shall have authority to determine each Recipient's Relative Water Share for the month, provided, however, that the Relative Share assigned by the Well Site Landowner for any Recipient pursuant to this Section 4(d) may not exceed that Recipient's Relative Water Share for the prior month by more than twenty percent (20%).

e. If any Recipient's meter malfunctions or fails to accurately measure that Recipient's water usage in any given month, that Recipient's Relative Water Share shall be set at one hundred twenty percent (120%) of that Recipient's Relative Water Share for the immediately preceding month in which such meter was functioning properly.

5. Limitations on Water Usage. No Recipient shall use more than Thirty-Five Thousand (35,000) gallons of water from the Well in any three-month period, unless agreed to in writing by the Parties.

6. Routine Well Operation and Maintenance.

a. The Well Site Landowner and Recipients shall be mutually responsible for the routine operation and maintenance of the Well. The Well Site Landowner shall perform, or arrange for the performance of, all day-to-day activities necessary to maintain the Well in a proper condition in order to carry out the purposes of this Agreement. The Well Site Landowner also shall be responsible for contracting the energy necessary to operate the Well for the purposes provided in this Agreement.

b. The Well Land Owner shall be responsible for the operation and maintenance expenses of the Well unless the Recipient's share of the expenses for any particular month, calculated by taking the total operation and maintenance expenses for the Well that month multiplied by the Recipients Relative Water Share for that month and divided by the total water usage from the Well for that month, exceeds thirty dollars (\$ 30.00). In such event, then the Recipient shall bear full responsibility for that Recipient's share of that month's expenses, unless otherwise agreed to, in writing, by the Well Land Owner.

c. If applicable under paragraph 6(b), on or before the tenth (10<sup>th</sup>) day of each month, the Well Site Landowner shall submit to Landowners a written invoice of their respective share of the operation and maintenance expenses for the Well for the prior month. Such expenses shall be allocated to Recipients in proportion to their Relative Water Share for that month, determined according to Section 6(a) hereof. Upon request of one (1) or more Recipients, the Well Site Landowner shall provide an itemized statement showing in reasonable detail the amount and purposes of each expenditure.

d. If applicable under paragraph 6(b), within five (5) days after receipt of any written invoice from the Well Site Landowner stating any amounts due for routine operation and maintenance expenses, Recipients shall remit the stated sum to the Well Site Landowner. Payment of any such amount shall be by check, and all checks shall be made payable to the Well Site Landowner or such other party as specified by the Well Site Landowner.

7. Extraordinary Repairs and Maintenance.

a. The need for any extraordinary repair and non-routine maintenance to the Well shall be determined by the Well Site Landowner, with notice to Recipients.

b. If the Well Site Landowner determines that extraordinary repair or non-routine maintenance of the Well is necessary, the Recipient's share of the costs of such repair or maintenance shall be calculated by (i) multiplying their Relative Water Shares for the immediately preceding twelve (12) months, or the amount of time since the Effective Date of this Agreement, whichever time period is less, by the total cost of the extraordinary repair or non-routine maintenance of the Well, and (ii) dividing by the total water usage from the well for the immediately preceding twelve (12) months, or the amount of time since the Effective Date of this Agreement, whichever time period is less. The Recipient shall not be responsible for the cost of any extraordinary repair and non-routine maintenance to the Well, unless the Recipient's share as calculated herein exceeds Four Hundred Dollars (\$400.00).

c. The Well Site Landowner shall perform, or arrange for the performance of, all extraordinary repairs or non-routine maintenance of the Well determined necessary pursuant to this Section 7. If applicable under paragraph 7(b), the Well Site Landowner shall submit to Recipients a written invoice for their respective share(s) of the expenses of such repair or maintenance, determined pursuant to Section 7(b) hereof. Within fifteen (15) days after receipt of any written invoice from the Well Site Landowner stating any amounts due for extraordinary repairs or non-routine maintenance expenses, Recipients shall remit the stated sum to the Well Site Landowner. Payment of any such fees shall be by check, and all checks shall be made payable to the Well Site Landowner or such other party as specified by the Well Site Landowner. The Well Site Landowner shall be responsible for remitting such amounts to the appropriate entities as may be necessary for payment in full for performing such repairs and maintenance.

d. Improvements and Upgrades needed and constructed by the Well Site Owner in connection with its ongoing Type 1 Minor Resort Development Plan shall not constitute an extraordinary repair or be deemed non-routine maintenance. The Well Site Owner shall solely bear the costs of all such improvements and upgrades. Recipients agree that the Well Land Owner is entitled to make all improvements necessary for the completion of its Type 1 Minor Resort Development Plan, or any other enterprise of its undertaking, and agree not to interfere, hinder, obstruct, or delay the Well Site Owner's improvements or upgrades to the Well or water delivery system.

8. Delinquent Payments.

a. Any payment that is required pursuant to this Agreement and not paid when due shall accrue a late fee of ten dollars (\$10) per day.

b. In the event a Recipient is late in a payment required pursuant to this Agreement, all of that Recipient's rights and privileges granted herein, including without limitation its right(s) of access to and use of water from the Well, shall be suspended indefinitely until payment is made as required, including any late fees accrued.

9. Reporting of Water Withdrawals and Use.

a. The Parties hereby each hereby appoint the Well Site Landowner, and the Well Site Landowner hereby accepts such appointment, as the "reporting party" for purposes of any ADWR or other governmental requirements with respect to the Well. Recipients agree to promptly provide all necessary information to the Well Site Landowner for purposes of compiling and submitting any and all required reports and fees regarding the Well to any governmental entity with jurisdiction over the Well or its operations.

b. The Recipients' share of any fees due to any governmental entity for any groundwater regulation fee with respect to the Well, shall be calculated by (i) multiplying the fees by their Relative Water Shares for the immediately preceding twelve (12) months, or the amount of time since the Effective Date of this Agreement, whichever time period is less, and (ii) dividing by the total water usage from the well for the immediately preceding twelve (12) months, or the amount of time since the Effective Date of this Agreement, whichever time period is less. The Recipient shall not be responsible for the fees due to any governmental entity for any groundwater regulation fee with respect to the Well, unless the Recipient's share as calculated herein exceeds Fifty dollars (\$50.00).

c. If applicable under paragraph 9(b), within five (5) days after receipt of any notice from the Well Site Landowner stating any amounts due to any governmental entity for any groundwater regulation fee with respect to the Well, Recipient's shall remit the stated sum to the Well Site Landowner for submission to such governmental agency. Payment of any such fees shall be by check, and all checks shall be made payable to the Well Site Landowner for the amount specified by the Well Site Landowner. Nothing contained in this subsection shall prevent any Party from contesting at its cost and expense any such fee for which it is responsible in any appropriate manner, so long as such contest is maintained with reasonable diligence and in good faith. At the time such contest is concluded the contesting Party shall promptly pay all such fees determined to be owing, together with all interest, penalties, and costs thereon in order to ensure the Well is in compliance with all applicable governmental rules and regulations.

10. Indemnity to the Well Site Landowner.

a. Landowners hereby agree to indemnify and hold harmless the Well Site Landowner for any damage or loss arising from performance of its duties under Sections 4(c), 4(d), 6(a), 6(b), 6(c), 7(a), 7(b), 7(c), 7(d), 9(a), 9(b) and 9(c) hereof, except to the extent that such damage or loss arises from intentional misconduct or gross negligence by the Well Site



Landowner. Each Party agrees to indemnify and hold harmless the other Party for any damage or loss arising from the first Party's failure to comply with any applicable law or regulation.

b. The Parties agree that the Well Site Landowner's acceptance of the duties pursuant to Sections 4(c), 4(d), 6(a), 6(b), 6(c), 7(a), 7(b), 7(c), 7(d), 9(a), 9(b) and 9(c) hereof is voluntary and subject to change. The Well Site Landowner retains the unilateral right to withdraw from such duties, and appoint a successor, at any time, with ten (10) days advance written notice to the Parties. In the event that the Well Land Owner has not appointed a successor, the Parties shall appoint a successor to carry out the duties assigned to the Well Site Landowner pursuant to the aforesaid sections. All rights and duties assigned to the Well Site Landowner herein shall thereafter inure to the benefit of its duly appointed successor.

11. Termination.

a. This Agreement shall terminate in full only under the following conditions:

- (1) By unanimous written agreement of the Parties; or
- (2) If water from the Well becomes unfit for the purposes for which it is intended.

b. If a Recipient subdivides its property, drills and constructs a well on its property, or builds an additional residence on the property, this Agreement shall terminate as to that Recipient's right(s) of access to and receipt of water from the Well. The Well Site Landowner may subdivide its property or build an additional residence or residence(s) on its property; provided, however, Recipient's shall retain their right(s) of access to and receipt of water from the Well pursuant to this Agreement.

c. Any Recipient may terminate his participation in this Agreement at his sole discretion by release of all claims, including, but not limited to, his rights to receive water from the Well Land Owner, and his right to access to the Well Land Owner's property by written notice to the Well Land Owner, and complying with paragraph 11(d)

d. Upon complete or partial termination of this Agreement, the affected Party shall execute and acknowledge an appropriate release of this Agreement in recordable form to be recorded in Pima County.

12. Liability. Each Party agrees to indemnify and hold harmless the other Party from any damage or loss to the other Party resulting from the first Party's intentional or negligent acts.

13. Water Quality. No guarantees, representations or warranties, express or implied, are made regarding the quality of water withdrawn from the Well. Each Party accepts water from the Well "as is," and each Party agrees to hold the other Party harmless for any injury or damage to any person, real property, or personal property arising from the quality of water withdrawn from the Well.

14. Disclosure to Prospective Purchasers. The Parties agree (a) that they will fully disclose this Agreement and its terms and conditions to any prospective purchasers, lenders, or owners of their respective properties and (b) that the transfer of this Agreement (and assumption of rights and obligations hereunder) shall be included as an express condition of sale or exchange of deed in connection with any subsequent change in ownership of any of said properties, with all terms and conditions set forth herein to be thereafter binding and enforceable upon the succeeding owner thereof.

15. Binding Agreement. This Agreement runs with the lands benefited hereby and is binding upon and inures to the benefit of the heirs, executors, successors, and assigns of the Parties, subject to the termination provisions of Section 11 hereof.

16. No Waiver. Any waiver at any time by any Party of its rights with respect to a default, breach, or any other matter arising in connection with this Agreement shall not be deemed a waiver with respect to any subsequent default, breach or matter.

17. Controlling Law, Jurisdiction, and Venue. This Agreement shall be interpreted and construed according to Arizona law. The Parties hereby agree that jurisdiction and venue in any action to enforce the provisions of this Agreement shall be proper in the Pima County, Arizona Superior Court.

18. Attorneys' Fees and Costs. In any dispute or action arising under this Agreement, the prevailing Party shall be entitled to recover its reasonable attorneys' fees and costs incurred therein.

19. Entire Agreement. This Agreement constitutes the entire understanding of the Parties and supersedes any previous agreement or understandings between the Parties on the subjects discussed herein. It may not be modified or amended except in writing executed by the Parties.

20. Notice; Change of Name or Address.

a. All notices, requests, demands, and other communications required under this Agreement shall be in writing and shall be deemed to have been received either when delivered or on the fifth (5th) business day following mailing, by registered or certified mail, postage prepaid, return receipt requested, whichever is earlier, addressed as set forth below:

(1) If to the Well Site Landowner:

William and Gretchen Shirley  
14545 E. Rincon Creek Ranch Road  
Tucson, AZ 85747

(2) If to Recipient David Surzyn:

David Surzyn  
14590 E. Rincon Creek Ranch Road  
Tucson, AZ 85747

(3) If to Recipient Don Crater:

Don Crater  
14500 E. Rincon Creek Ranch Road  
Tucson, AZ 85747

b. Any Party may change the addressee or address to which communications or copies are to be sent by giving notice of such change of addressee or address in conformity with the provisions of this Section 20 for giving notice.

21. Amendments. Any amendment, modification or termination of this Agreement shall be effected only by a written instrument referring hereto, executed and acknowledged by each of the Parties, and recorded with the County Recorder of Pima County, Arizona.

22. Time of Essence. Time is of the essence under this Agreement. Any extension of time for performance under this Agreement by either Party must be in writing. No extension will be deemed a waiver of this paragraph with respect to any future performance by a Party.

23. Severability. If any provision or any portion of a provision of this Agreement is deemed to be invalid, illegal or unenforceable, such invalidity, illegality or unenforceability shall not affect the remaining portion of that provision or of any other provision of this Agreement, as each provision of this Agreement shall be deemed to be severable from all other provisions hereof.

24. Not Partners or Joint Ventures. Neither this Agreement, nor any activity of the Parties in connection herewith shall constitute the Parties as partners or joint ventures for any purposes whatsoever.

25. Interpretation. The Parties hereby acknowledge and agree that each has been given the opportunity to independently review this Agreement with legal counsel, and that this Agreement is the result of arms' length negotiations between the Parties. In the event of any ambiguity in or dispute regarding the interpretation of Agreement, the interpretation shall not be resolved by any rule of interpretation providing for the interpretation against the party who caused the uncertainty to exist or against the draftsman.

26. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, with the same force and effect as if all signatures were appended to one instrument.

27. Transactions Costs. Each Party expressly agrees to bear its own attorneys' fees and other costs associated with the preparation, review, execution, and implementation of this Agreement.

28. Recording. Any Party may record this Agreement in the records of the County Recorder in Pima County, Arizona.

IN WITNESS HEREOF, this Agreement is executed by the Parties and made effective on the date first written above.

WELL SITE LANDOWNER

By: \_\_\_\_\_ and \_\_\_\_\_

RECIPIENTS (COLLECTIVELY)

By: \_\_\_\_\_ and \_\_\_\_\_

By: \_\_\_\_\_ and \_\_\_\_\_

STATE OF ARIZONA    )  
                                  ) ss.  
County of Pima        )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2011, by [Well Site Landowner].

\_\_\_\_\_  
Notary Public

My commission expires:

\_\_\_\_\_

STATE OF ARIZONA    )  
                                  ) ss.  
County of Pima        )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2011, by \_\_\_\_\_ and \_\_\_\_\_

\_\_\_\_\_  
Notary Public

My commission expires:

\_\_\_\_\_

STATE OF ARIZONA    )  
                                  ) ss.  
County of Pima        )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2011, by \_\_\_\_\_ and \_\_\_\_\_

\_\_\_\_\_  
Notary Public

My commission expires:

\_\_\_\_\_

STATE OF ARIZONA    )  
                                  ) ss.  
County of Pima        )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2011, by \_\_\_\_\_ and \_\_\_\_\_

\_\_\_\_\_  
Notary Public

My commission expires:

\_\_\_\_\_

STATE OF ARIZONA    )  
                                  ) ss.  
County of Pima        )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2011, by \_\_\_\_\_ and \_\_\_\_\_

\_\_\_\_\_  
Notary Public

My commission expires:

\_\_\_\_\_

# **Appendix “B”**

**Transferees/Co-Applicant  
William Shirley and Gretchen Shirley  
Opening Brief  
October 27, 2011  
Docket No. E-03783A-10-0172**

**Donald Crater**  
**14500 E. Rincon Creek Ranch Road**  
**Tucson, Arizona 85747**

October 23, 2011

The Honorable Belinda A. Martin  
Administrative Law Judge  
Arizona Corporation Commission  
Hearing Division  
400 W. Congress  
Tucson, Arizona 85701

Re: Rincon Creek Water Company Sale and Transfer  
Docket No. W-03783A-10-0172

Your Honor:

I own land parcel 205-75-0240 located immediately south of Bill and Gretchen Shirley's Rincon Creek Ranch. The Shirley's purchased the ranch from Mr. Michael Schultz and it is my understanding that the Shirley's have applied to acquire the Rincon Creek Water Company from Mr. Schultz. My property has been receiving water at no charge from the well located on the Rincon Creek Ranch for as long as I have owned the property, and to my knowledge, for as long as this property has had water service.

It is my understanding that the Shirley's are seeking to extinguish the Rincon Creek Water Company as a public utility, and continue my water service by private well sharing agreement. I have met with the Shirley's and reviewed a sample of the proposed Well Sharing Agreement which I understand will be submitted to you for your consideration.

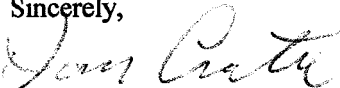
The proposed agreement allows me to continue to receive water in exchange for my help and cooperation with maintenance and repairs. This has been my agreement and practice with Mr. Schultz, and now with the Shirley's since they purchased the Rincon Creek Ranch. I understand that my water usage may have to be metered for reporting to the appropriate government agencies, and that I will have a responsibility to curtail my water usage proportionately in the event of drought or limited well capacity.

I urge you to grant the Shirley's request to continue under a shared well agreement rather than a utility, as this accurately reflects our situation as it exists today. Gilbert Acosta, the original developer in the 1950's, started the water company with thought that our area might one day become a large subdivision, but in fact, we really haven't grown beyond Gilbert's day.

My neighbor, David Surzyn, has informed me that he is going to be putting in his own private well, and has offered to allow me to go in with him. I haven't decided whether that is suitable for me, but if I do I will no longer be receiving water from the Shirley's.

If you have any questions, please do not hesitate to ask.

Sincerely,



Don Crater  
(520) 260-7744



**David Surzyn**  
**14590 E. Rincon Creek Ranch Road**  
**Tucson, Arizona 85747**

October 23, 2011

The Honorable Belinda A. Martin  
Administrative Law Judge  
Arizona Corporation Commission  
Hearing Division  
400 W. Congress  
Tucson, Arizona 85701

Re: Rincon Creek Water Company Sale and Transfer  
Docket No. W-03783A-10-0172

Your Honor:

I own land parcels 205-75-0220 and 205-75-0230 located immediately south of Bill and Gretchen Shirley's Rincon Creek Ranch. The Shirley's purchased the ranch from Mr. Michael Schultz and it is my understanding that the Shirley's have applied to acquire the Rincon Creek Water Company from Mr. Schultz. My property has been receiving water at no charge from the well located on the Rincon Creek Ranch for as long as I have owned the property, and to my knowledge, for as long as this property has had water service.

It is my understanding that the Shirley's are seeking to extinguish the Rincon Creek Water Company as a public utility, and continue my water service by private well sharing agreement. I have met with the Shirley's and reviewed a sample of the proposed Well Sharing Agreement which I understand will be submitted to you for your consideration.

The proposed agreement allows me to continue to receive water in exchange for my help and cooperation with maintenance and repairs. This has been my agreement and practice with Mr. Schultz, and now with the Shirley's since they purchased the Rincon Creek Ranch. I understand that my water usage may have to be metered for reporting to the appropriate government agencies, and that I will have a responsibility to curtail my water usage proportionately in the event of drought or limited well capacity.

I urge you to grant the Shirley's request to continue under a shared well agreement rather than a utility, as this accurately reflects our situation as it exists today. Gilbert Acosta, the original developer in the 1950's, started the water company with thought that our area might one day become a large subdivision, but in fact, we really haven't grown beyond Gilbert's day.

It is my intent to install my own well at the beginning of 2012. I am presently investigating costs and contractors. Upon completion of that well, I will no longer require water from the Shirley's.

If you have any questions, please do not hesitate to ask.

Sincerely,



David Surzyn  
(520) 647-7924

10-24-11

**Rick and Alisa Brinkerhoff  
7120 S. Camino Loma Alta  
Tucson, Arizona 85747**

October 24, 2011

The Honorable Belinda A. Martin  
Administrative Law Judge  
Arizona Corporation Commission  
Hearing Division  
400 W. Congress  
Tucson, Arizona 85701

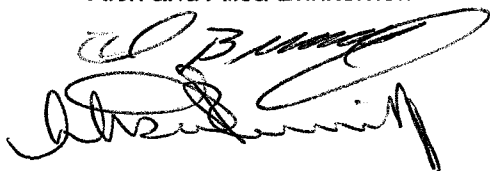
Re: Rincon Creek Water Company Sale and Transfer  
Docket No. W-03783A-10-0172

Your Honor:

We own land parcel 205-86-032B located west of Bill and Gretchen Shirley's Rincon Creek Ranch. We used to receive water from the Rincon Creek Water Company well located on the Rincon Creek Ranch, but we, and our neighbors to the east, Dan and Cheryl Emde, now receive our water exclusively from the private well 55-801213.

Sincerely,

Rick and Alisa Brinkerhoff

Handwritten signatures of Rick and Alisa Brinkerhoff. The signatures are written in black ink and are positioned below the typed names. The signature for Rick is on top and the signature for Alisa is below it.

Dan and Cheryl Emde  
7121 S. Camino Loma Alta  
Tucson, Arizona 85747

October 24, 2011

The Honorable Belinda A. Martin  
Administrative Law Judge  
Arizona Corporation Commission  
Hearing Division  
400 W. Congress  
Tucson, Arizona 85701

Re: Rincon Creek Water Company Sale and Transfer  
Docket No. W-03783A-10-0172

Your Honor:

We own land parcel 205-86-032A located immediately west of Bill and Gretchen Shirley's Rincon Creek Ranch. We used to receive water from the Rincon Creek Water Company well located on the Rincon Creek Ranch, but we, and our neighbors to the west, Ricky and Alisa Brinkerhoff, now receive our water exclusively from the private well 55-801213.

Sincerely,

The block contains two handwritten signatures. The signature on the left is 'Cheryl Emde' in a cursive script. The signature on the right is 'Dan Emde' in a cursive script.

Dan and Cheryl Emde